



U.S. Department of Justice

Justice Management Division

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Washington, D.C. 20530

MEMORANDUM FOR BETH S. BRINKMAN

Deputy Assistant Attorney General, Appellate Staff
Civil Division

FROM:

Lee J. Lofthus

Assistant Attorney General for Administration and
Designated Agency Ethics Official

SUBJECT:

Participation in Matters Relating to Persons Detained at Guantanamo
Bay

The purpose of this memorandum is to provide guidance, under the standard of conduct on impartiality, 5 C.F.R. § 2635.502, on the scope of your recusal from certain detainee matters as it relates to your responsibilities as the Deputy Assistant Attorney General for the Civil Division's Appellate Staff. The need to consider recusal arises from the fact that your former law firm, Morrison & Foerster, represents a detainee, Jobran Al-Quhtani, in *Al-Quhtani v. Obama*, No. 05-CV-2387-RMC (D.D.C.) (*Al-Quhtani*) and from the fact that, while at your former firm, you represented amici federal judges before the Supreme Court in *Boumediene et al. v. Bush et al.*, the case in which the Court held that the detainees at Guantanamo had a right to habeas corpus. You do not seek to participate in *Al-Quhtani* or in *Boumediene*. With respect to the other matters described below, I have determined that your participation is permitted under 5 C.F.R. § 2635.502.¹

There are four sets of detainee related matters being handled by the Civil Division, each of which may raise issues in which you would be called upon to offer advice and make decisions. One set of detainee related matters involves cases under the Detainee Treatment Act pending in the United States Court of Appeals for the District of Columbia. These cases have been dismissed

¹ I have been advised that you also have sought advice from the Professional Responsibility Advisory Office (PRAO) with respect to potential conflicts arising under the rules of professional responsibility. We have considered possible conflicts only under the conflict of interest statute, the standards of conduct and Executive Order 13490, in making this determination. If PRAO advises recusal from specific matters which this determination has authorized, such recusals may be required notwithstanding this determination.

for lack of subject matter jurisdiction. However, it is expected that some detainees may seek rehearing or file certiorari petitions. The Civil Division is responsible for preparing responses to any such filings.

A second set of detainee related matters involves approximately 250 pending habeas corpus cases involving persons detained at Guantanamo Bay (GTMO). Various merits briefs, discovery, and other litigation filings in these cases occur on nearly a daily basis. In addition, these cases involve a variety of sensitive and complex issues including access to classified information, maintaining information under seal, and whether discovery may reach materials being assembled by the task force carrying out the review of detainee cases under Executive Order 13492 of January 22, 2009. *Al-Quhtani* is one of these habeas corpus cases.

In *Boumediene*, there is likely to be further litigation with respect to only one of five detainees and that detainee is not represented by Morrison & Foerster. You do not seek to participate in the remaining matter.

A third set of detainee related matters involves actions against individual government officers brought by former detainees for damages allegedly arising out of their detention. These actions generally allege deprivation of Constitutional or statutory rights based on conditions of confinement at GTMO. The Civil Division is defending these lawsuits.

A fourth set of detainee related matters involves providing legal advice and participation in litigation arising out of Military Commission Proceedings concerning GTMO detainees. The Civil Division has participated in these matters in the past and may be called upon to do so in the future.

Standards of Conduct.

The standard of conduct on impartiality at 5 C.F.R. § 2635.502 provides that an official may not participate in any particular matter involving specific parties in which a person with whom the employee has a "covered relationship" is a party or represents a party. Included in the definition of a covered relationship is any person for whom the official served, within the preceding year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee. 5 C.F.R. § 2635.502(b)(1)(iv). You have a covered relationship with your former firm, Morrison & Foerster, which represents a detainee in *Al-Quhtani*. You did not participate in this matter when you were a partner at the firm, you have advised that you have no confidential information concerning this matter, and you have recused from participating in reviewing any individual detainee matter in which your former firm represents a party. In addition, we consider whether your participation on behalf of amici in *Boumediene* could create an appearance problem warranting analysis under the impartiality rule. You represented a group of federal judges who filed a brief as amici in the Supreme Court, which argued that the Detainee Treatment Act's judicial review of the legality of the detention of Guantanamo detainees was an inadequate

substitute for federal habeas corpus because courts were not authorized to determine the extent to which the underlying evidence was obtained through torture or impermissible coercion. You did not represent a party in the case, and you have advised that you have no confidential information concerning the detainees' positions in the *Boumediene* case. The legal issue addressed in the brief was resolved by the Court's decision.

The detainee related matters described above are highly sensitive matters that are of great importance to the Department. The Civil Division represents the United States in the litigation, and is providing advice in the other matters as described above. As the Deputy Assistant Attorney General for the Appellate Staff in the Civil Division, you are charged with responsibility to provide overall supervision on civil appellate matters. To the extent that your participation in these decisions might be perceived as having an effect on the individual case in which your former firm represents a detainee, and the remaining detainee case in *Boumediene*, it is appropriate to consider whether such participation would implicate the impartiality standard. In the past, the Department has considered whether recusal is necessary or appropriate in circumstances such as these under the general standard in the impartiality regulation, namely whether a reasonable person with knowledge of the relevant facts would question a person's impartiality in performing his or her official duties. 5 C.F.R. § 2635.502(a)(2).

I believe that concern regarding any potential appearance of loss of impartiality is minimal in this case and that a reasonable person would not question your impartiality. Your advice and decisions will affect potential Detainee Treatment Act cases that have been dismissed, the habeas corpus cases, of which *Al-Qutani* is one, matters involving actions against individual government officers, and litigation arising out of the Military Commission Proceedings. Many of the decisions made in this wide range of matters directly affect decisions made in others, and require a level of coordination and familiarity with the legal and strategic issues presented. It is necessary that you be able to provide advice to the Assistant Attorney General for the Civil Division and the leadership of the Department, and exercise your supervision as the head of the Appellate Staff. I do not believe that a reasonable person would question your impartiality in making these judgments due to your former firm's representation of a party in one pending matter, or due to your past representation of amici in one matter which is largely concluded and where your former firm has never represented a party and does not now represent a party. In addition, I have determined that any potential appearance of loss of impartiality is outweighed by the need for your participation in these matters.

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CONCLUSION: For the reasons set forth above, I conclude that you may participate in decisions relating to the detainee matters described above and may participate in all related policy matters arising from these cases. You remain recused from decisions relating specifically to *Boumediene*, relating specifically to the disposition of the particular detainee represented by your former firm in *Al-Qutani* or in any other matter in which your former firm represents a party.

cc: Thomas Perrelli
Tony West